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OF DOCTORS, HOSPITALS AND LIMITATIONS — “THE PATIENT’S DILEMMA”

BY JOHN P. S. McLAREN*

Act I — The Patient Bound and the Doctor Unchained

Amidst the bewildering complex of limitation periods which govern the actionability of tort claims across Canada, an object of particular puzzlement is the disparity between the periods applicable to negligence actions at large on the one hand, and those prescribed for malpractice actions against various classes of medical professionals and medical institutions on the other.

The initiation of malpractice claims against physicians in Canada is limited in most instances to a period of one year,¹ usually by virtue of special and distinct legislative provisions, a shorter time span than pertains in the case of other negligence actions. Only one jurisdiction, the North West Territories, lacks a special provision covering this type of suit.² In Newfoundland, Manitoba and the Yukon the limitation period is set at two years for medical malpractice.³ Only in the latter two jurisdictions is the period identical to that ordained by general limitation legislation for negligence resulting in personal injury.⁴

Also protected by truncated limitation periods in one jurisdiction or another are other groups of medical professionals, such as dentists,⁵ pharma-

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¹Alberta — *The Limitation of Actions Act*, R.S.A. 1970, c. 209, s. 55; British Columbia — *Medical Act*, R.S.B.C. 1960, c. 239, s. 82, S.B.C. 1966, c. 26, s. 48; New Brunswick — *Medical Act*, S.N.B. 1958, c. 74, s. 30; Nova Scotia — *The Statute of Limitation Act*, R.S.N.S. 1967, c. 168, s. 2; Ontario — *The Medical Act*, R.S.O. 1970, c. 268, s. 48; Prince Edward Island — *The Prince Edward Island Medical Act* S.P.E.I. 1952, c. 31, s. 31; Saskatchewan — *The Medical Profession Act*, R.S.S. 1965, c. 303, s. 55.

²There is no mention of special limitation period in either the *Medical Professions Ordinance* R.O.N.W.T. 1956, c. 68 or the *Limitation of Actions Ordinance* R.O.N.W.T. 1956, c. 59.

³Newfoundland — *The Newfoundland Medical Board (Amendment) Act*, S. N'fld. 1959, No. 11, s. 2; Manitoba — *The Medical Act*, R.S.M. 1970, C.M. 90, s. 43; Yukon — *Medical Profession Ordinance*, R.O.Y.T. 1958, c. 73, s. 10.

⁴In Manitoba a general revision of limitation legislation took place in 1966, in which by specific provision in the amending Act, the limitation sections in other statutes were brought into line — see *The Limitation of Actions Amendment Act*, S.M. 1966-67, c. 32, s. 5 Schedule A, § 6-21.

⁵R.S.A. 1970, c. 209, s. 55 (1 year); R.S.B.C. 1960, c. 99, s. 65 (1 year); R.S.N.S. 1967, c. 168, s. 2 (1 year); S.N. N'fld. 1968, No. 82, s. 31 (2 years); R.S.O. 1970, c. 108, s. 28 (6 months); S.P.E.I. 1969, c. 37, s. 12(2) (6 months); R.S.S. 1965, c. 311, s. 57 (12 months).

cists,⁶ veterinarians,⁷ radiological technicians,⁸ optometrists,⁹ chiropractors,¹⁰ naturopaths,¹¹ and various types of hospitals and their professional staffs.¹²

Strangely enough this disparity in limitation periods does not exist in the cases of assault and battery. In every jurisdiction medical men or institutions are subject to the same time periods for these torts as any other individual or institution.¹³

Where there is no equivalence between the limitation periods for medical malpractice suits and negligence actions the degree of disparity varies depending on the extent to which general limitation legislation has undergone amendment. In British Columbia, New Brunswick, Newfoundland, Nova Scotia and Ontario, which still cling to the English Statute of Limitations of James I¹⁴ and a six year period for "actions on the case" other than slander, the difference between the periods is four or five years.¹⁵ In Prince Edward Island, Saskatchewan and Alberta, which have adopted the Uniform Act of 1931 in its virgin form,¹⁶ or modified it¹⁷ and accept a two year period for negligence in personal injury, the variance is one year.

No other professional group enjoys the same degree of procedural protection from suit. Indeed, as general theory seems to favour treating the

⁶ R.S.B.C. 1960, c. 282, s. 57 (6 months); R.S.N.S. 1967, c. 229 (1 year); R.S.O. 1970, c. 348, s. 62 (6 months); R.O.Y.T. 1958, c. 87, s. 9 (1 year).

⁷ R.S.N.S. 1967, c. 327, s. 12 (1 year); R.S.O. 1970, c. 480, s. 17 (6 months); R.S.S. 1965, c. 327, s. 18 (6 months).

⁸ R.S.O. 1970, c. 399, s. 13 (1 year); R.S.S. 1965, c. 325, s. 12 (1 year).

⁹ R.O.Y.T. 1958, c. 83, s. 10 (1 year).

¹⁰ R.S.A. 1970, c. 209, s. 55 (1 year); R.S.S. 1965, c. 321, s. 18 (6 months); R.O.Y.T. 1958, c. 15, s. 10 (1 year).

¹¹ R.S.A. 1970, c. 209, s. 55 (1 year); R.S.S. 1965, c. 324.

¹² See e.g. *Public Hospitals*: R.S.A. 1970, c. 209, s. 56 (1 year); R.S.B.C. 1960, c. 178, s. 36 (2) (1 year); S. Nfld. 1971, c. 81, s. 37 (1 year); R.S.N.S. 1967, c. 249, s. 15; S.P.E.I. 1959, c. 16, s. 15, and R.S.O. 1970, c. 378, s. 33 (6 months).

Mental Hospitals: Actions are barred in Alberta (R.S.A. 1970, c. 231, s. 36), Manitoba (R.S.M. 1970, c. M110, s. 94(57)), New Brunswick (S.N.B. 1969, c. 13, s. 66(3)), P.E.I. (S.P.E.I. 1968, c. 37, s. 57), Saskatchewan (R.S.S. 1905, c. 345, s. 54). In B.C. the limitation period is 1 year (S.B.C. 1964, c. 29, s. 19 (2)) and in Ontario 6 months (R.S.O. 1970, c. 270, s. 9).

¹³ As an example of a situation involving a doctor where the limitation period applied was that for assault and battery, see *Marshall v. Curry*, [1933] 3 D.L.R. 260 (N.S.S.C.T.D.). Ironically the limitation period for assault and battery in that province at the time was shorter than that for malpractice.

¹⁴ 21 Jac. 1, c. 16, s. 3. See R.S.B.C. 1960, c. 370, s. 3; R.S.N.B. 1952, c. 133, ss. 4, 9; R.S. Nfld. 1952, c. 146, s. 2; R.S.N.S. 1967, c. 168, s. 2; R.S.O. 1970, c. 246, s. 45 (1).

¹⁵ In the case of Newfoundland the difference is four years, as a two year period obtains in medical malpractice cases. See *supra*, note 3.

¹⁶ For the text of the Uniform Act, see Proceedings of the 14th Annual Meeting of the Commissioners of Uniformity of Legislation in Canada, (1931) at 38. See also R.S.P.E.I. 1951, c. 87, s. 2; R.S.S. 1965, c. 84, s. 3.

¹⁷ R.S.A. 1970, c. 209, s. 51.

responsibilities of other professionals to clients as contractual in character,¹⁸ the standard contract limitation period of six years applies in the case of malpractice suits against them by their clients. In the case of negligence suits by third parties, which are obviously tort actions, the period is the common one in the jurisdiction for that form of negligence.¹⁹

Not only are medical personnel and institutions governed by shorter periods of limitation, but the statutes also specify the date when time starts to run. In general limitation statutes, the only guidance offered on the commencement of the limitation period is contained in vague phrases such as 'from the time the cause of action arises'.²⁰ The special malpractice provisions, with the exception of that of New Brunswick, prescribe that time runs from 'the termination of professional services'.²¹

Act II — The Plot Exposed

The existence of special limitation periods for medical professionals and institutions naturally evokes questions of when, how and why this remarkable legislative coup occurred.

The genesis of special limitation periods in medical malpractice cases is the *Act to Amend the Medical Act* passed by the Ontario legislature in 1887.²² Section 2 of that Act prescribed that

No duly registered member of the College of Physicians and Surgeons of Ontario shall be liable for any action for negligence or malpractice, by reason of professional services requested or rendered, unless such action be commenced within one year from the date when in the matter complained of such professional services terminated.

The spirit of this provision was subsequently reproduced in special limitation provisions in most of the other common law jurisdictions.²³

The answer to the question of how this legislation found its way into the statute book is less obvious, because of the lack of Hansard reports covering the legislative debates of that era. However, a hint is found in the earliest Ontario case to interpret the provision, *Miller v. Ryerson*.²⁴ In that case the Chancery Division of the High Court was requested by the plaintiff,

¹⁸See for character of solicitor-client relationship *Howell v. Hughes* (1826), 5 B&C 259; 108 E.R. 97; *Groom v. Crocker*, [1938] 2 All E.R. 394 (C.A.); *Clark v. Kirby Smith*, [1964] 2 All E.R. 835 (Ch.D.); *Frind v. Sheppard*, [1940] 4 D.L.R. 455 (Ont. C.A.), rev. on other grounds [1941] S.C.R. 531; *Schwebel v. Talekes*, [1967] 1 O.R. 541 (C.A.). For the nature of the architect-client relationship see *Bagot v. Stevens, Scanlan & Co.*, [1964] 3 All. E.R. 577 (Q.B.D.).

¹⁹On the problems posed in finding the appropriate limitation period for professional negligence involving misstatement or bad advice, see McLaren, *The Impact of Limitation Periods on Actionability in Negligence* (1969), 7 *Alta L. Rev.* 247 at 267.

²⁰The term "accrues" is used in some of the statutes.

²¹For some reason the term 'professional services' is used most often in relation to actions against dentists, see J. Williams, *Limitation of Actions in Canada* (Toronto: Butterworths, 1972) at 231-33.

²²S.O. 1887, c. 24.

²³S.A. 1906, c. 28, s. 59; S.B.C. 1947, c. 44, s. 82; S.M. 1888, c. 36, s. 9; S.N.B. 1903, c. 118; S.N.Fld, 1959, c. 11, s. 2; S.N.S. 1899, c. 32, s. 35; R.O.N.W.T. 1889, No. 5, s. 39; S.P.E.I. 1899, c. 24, s. 22; S.S. 1906, c. 28, s. 55; O.Y. 1912, c. 1, s. 9.

²⁴(1892), 22 O.R. 369 (C.A.).

who was clearly out of time on a strict construction of the provision, to give it a liberal interpretation and thereby allow her to proceed with her suit. The Court rejected this argument, asserting that it was bound by the specific words of the provision in the Medical Act. In rendering his judgement Boyd C. admitted the inequities inherent in this interpretation, but contented himself with the observation that 'it shews what an admirable safeguard has been thrown around the College of Physicians and Surgeons of Ontario.'²⁵ Meredith J. added the blunt comment

It is not an Act respecting limitation of actions, but one passed for the benefit of the medical profession; nor is the provision in question an amendment of the provisions of any such statute, but simply a provision for the special protection of the registered members of that profession.²⁶

One might well surmise that the amendment to the Medical Act was the result of pressure upon the government of the day by the College of Physicians and Surgeons.²⁷

The reason for the concern of the medical profession over the application of the general limitation period for negligence seems to have been the simple fear of being confronted with claims by disaffected patients for six years which prior to the early nineteen thirties was the standard period of limitations in all the common law jurisdictions.²⁸ In the absence of any willingness on the part of the legislature to conduct a general revamping of limitation periods, the conclusion seems to have been reached that a special plea for protective legislation for medical men should be made. This viewpoint was undoubtedly dramatized by the profession drawing attention to the tenuous position of the physician who had to labour under the lingering threat of suit by disgruntled patients. In an era when medical talents were possessed by few, when medical services were at a premium and when medical men were often highly respected leaders in the community, the plea had an obviously compelling quality to it.

The form of the protective legislation is uniquely Canadian.²⁹ There was no precedent for special limitation periods for medical malpractice in England. While special provisions were developed in the United States in

²⁵*Id.*, at 372.

²⁶*Id.*, at 373.

²⁷If there was more in the way of supporting documentary evidence, the writer would have been tempted to suggest that the Legislation stemmed from an effective lobbying campaign by the College. We do know that of the fourteen members of the Select Committee of the Legislature to which the Bill was referred after second reading, no less than five were doctors (Letter received from the Archives of Ontario, Jan. 15, 1973). This suggests that the medical profession had a significant presence within the Legislature. The lobbying theory gains some support too from the debates of the Legislature of New Brunswick when similar legislation was under consideration there in 1903. The Hon. Mr. Pugsley, the minister introducing the legislation, made it abundantly clear that not only the inspiration, but also the form of the limitation provision derived directly from the New Brunswick Medical Society (Synoptic Reports of the Proceedings of the Legislature of New Brunswick, 1903 Session, 117).

²⁸Not until the publication of the Uniform Act in 1931 was there any significant departure from the English pattern set down in the Statute of Limitations 1623.

²⁹A point made by Boyd C. in *Miller v. Ryerson*, *supra*, note 24 at 372.

certain jurisdictions, some predating the Ontario enactment,³⁰ these were incorporated into general limitation statutes with the normal vague directions on the commencement of the limitation period. Only recently has any jurisdiction in the United States enacted a provision to the effect that time is to run from the termination of services.³¹ While there is no evidence as to why the termination of professional services in the matter complained of was chosen in Canada as the point from which time should run, it is probably safe to assume that that particular formulation seemed the most likely to provide a certain date which would be readily ascertainable by both parties.³² Given the controversy which until recently has surrounded the determination of the point at which time normally starts to run in negligence actions, the concern to inject greater predictability into the operation of time periods in malpractice suits is understandable.

Act III — A Swab Concealed

Although the legislation governing limitation periods in malpractice suits contains a more definitive characterization of the point at which time starts to run, its application in practice has from time to time presented serious obstacles to patients. The satisfactory application of the limitation formula assumes that the plaintiff-patient is aware of existence of the cause of action within the prescribed period after the termination of services. As it is crucial to the success of a negligence claim that there is damage or injury flowing from negligent conduct,³³ he must be in a position to realize that he has suffered or is suffering injury from an act or omission of the physician, which he, the patient, claims was negligent. In some instances, however, the element which consummates the cause of action, that is the injury, may not have revealed its symptoms, and therefore the patient is likely to be ignorant of its existence, or even if it has, he may not be in a position to connect those symptoms with any conduct on the part of the doctor.

The classic situation is where the doctor in carrying out an operative procedure on the patient leaves a foreign object, for example a surgical swab, tubing or forceps, within the body which does not manifest its presence until much later.³⁴ A second illustration is provided by the case where the physician in conducting an operation or course of treatment does the job carelessly or incompetently, and the adverse consequences are slow in developing.³⁵ A third situation exists where a physician negligently examines a patient, fails to diagnose properly a medical problem and leaves the latter with the erroneous

³⁰See, for example, that of New Hampshire which dates from 1867 — R.S. §508:4.

³¹The State of Michigan amended its legislation to that effect in 1963. See Mich. Comp. Laws § 600.5838 (1963).

³²This was accepted as the rationale in the Saskatchewan case of *Tremeer v. Black* (1924), 18 Sask. L. R. 260, [1924] 2 D.L.R. 520 (C.A.), [1924] 2 W.W.R. 97. See the judgement of Haultain C. J. at 100.

³³This is conclusively settled in Canada by *Long v. Western Propeller Co. Ltd.* (1968), 67 D.L.R. (2d) 34 (Man. C.A.) See also *Schwebel v. Telekes*, [1967] 1 O.R. 541 (C.A.), per Laskin J.A. at 544.

³⁴See the alleged facts in *Tremeer v. Black*, *supra*, note 32.

³⁵See the alleged facts in *Miller v. Ryerson*, *supra*, note 24.

impression that he is medically sound, thus postponing necessary medical treatment.³⁶ In each of these cases the patient can justifiably argue that during the limitation period he had no real basis for a suit, and that to allow the statutory period of time to run in the normal way is patently inequitable. Indeed, the victim of medical malpractice has a particularly compelling case for special consideration because in most instances the only source of advice and counsel regarding his physical condition will be the doctor who has treated, operated upon, or examined him. Accordingly, his knowledge will be limited to that of his physician. Only if the patient happens to consult another medical practitioner may his true medical status be established, and even then it may be too late for the purpose of bringing suit.

In the main, plaintiffs in medical malpractice suits have found themselves in a weak position in belated discovery situations. Whether the physicians who were the inspiration of the original legislation realized it or not, the decision to embody the provision in a statute separate and distinct from the Limitation Act was a protective masterstroke. Its practical effect has been both to rule out any flexibility in interpretation, and to preclude the application of well established legislative and equitable exceptions to the normal running of time, which could be used in certain instances to achieve a similar effect. Consequently in most cases the plaintiff's action has floundered on the limitation quicksands.³⁷

That the courts would be hamstrung by the particularity of the legislation became evident as early as 1892 in *Miller v. Ryerson*.³⁸ In that case the plaintiff at the time of the trial was nine years old. She had been treated by the defendant physician at the age of six. It was alleged on her behalf that due to the negligence of the defendant she had become permanently deaf and dumb. The action had not been launched earlier because these injuries did not manifest themselves until three years after the conclusion of the treatment. Counsel for the plaintiff argued that justice demanded that in such circumstances time could only run from the date on which the adverse consequences became apparent, and that the limitation section in the Medical Act was subject to the rule contained in the Limitation Act that infancy tolled the operation of the limitation period. The Chancery Division concluded somewhat wistfully that the wording of the statute would admit of no other interpretation than that the termination of professional services was the crucial point in time, and that it was contrary to accepted canons of interpretation to use a general provision in one statute to limit a narrow and specific provision in another.

The Saskatchewan Court of Appeal came to a similar conclusion in its interpretation of the equivalent provision in the Medical Professions Act of

³⁶See the Illinois case of *Lipsev v. Michael Reese Hospital* (1970), 46 Ill. 2d 32, 262 N.E. 2d 450. The defendants in 1963 diagnosed a lump on the plaintiff's left arm as non-malignant. Three years later it was found that it had been malignant, that the malignancy had spread, and that radical surgery was required to remove the left breast, arm and shoulder.

³⁷The volume of cases has been small in Canada. In the four medical malpractice cases in which belated discovery has been a problem, the plaintiff has been barred from proceeding further in three.

³⁸*Supra*, note 24.

that province in the case of *Tremeer v. Black*.³⁹ The plaintiff alleged that in the course of a gall bladder operation performed on him in 1916 the defendant had negligently left a tube inside him. The presence of the tube was not revealed until a further operation in 1923 conducted by another physician. The applicable limitation period at that time was a mere six months.⁴⁰ The plaintiff endeavoured to argue that the application of the provision was subject to the equitable doctrine of 'fraudulent concealment' which would have made the time of discovery, that is the date of the second operation, the relevant starting point. The Court, however, following the reasoning of the Miller case and not without regret, concluded that the special starting point in the statute was absolute, unlike that in the general limitation enactment, and was therefore outside the purview of the equitable principle which the plaintiff had attempted to invoke. Accordingly his action was adjudged to be out of time.

The reasoning in the Miller case has recently received the unequivocal approbation of the Ontario Court of Appeal in *Philippon v. Legate*.⁴¹ A negligence action was launched on behalf of an infant against a doctor and hospital as joint defendants almost eight years after the termination of treatment. The plaintiff, therefore, faced the double obstacle of a one year period under *The Medical Act*,⁴² and a six month period under *The Public Hospitals Act*.⁴³ The issue arose of whether the plaintiff could benefit by the application of section 47 of *The Limitation Act* which allows for the tolling of time during the infancy of the plaintiff. Schroeder J. A. speaking for the court found that not only previous authority, but also section 45 (2) of *The Limitation Act* itself precludes the application of this exception. The latter section specifically rules out the application of the limitation periods laid out in 45 (1) in cases where time is specially limited elsewhere. As the right to plead the infancy exception in section 47 is tied to situations covered by section 45, the plaintiff is clearly not a person within the contemplation of the general statute. He closed by observing that 'in enacting s. 45 (2) the legislature was simply giving effect to the maxim *generalia specialibus non derogant*'.⁴⁴

The obvious conclusion from the preceding cases is that where a court finds that medical services have clearly terminated more than a year before the discovery of the cause of action the terms of the legislation prevent any consideration of the patient's procedural plight. However, that does not mean that the patient is always thwarted, for the courts have been prepared to adopt a more flexible outlook in determining just when the services rendered came to an end. In some instances, while the realization that a cause of action exists may postdate by a considerable margin the negligent act or omission, the judge may be able to find that the professional services concerned continued to a date falling within the prescribed limitation period. Of particular interest in this

³⁹*Supra*, note 32.

⁴⁰R.S.S. 1920, c. 135, s. 56.

⁴¹[1970] 1 O.R. 392, 8 D.L.R. (3d) 506 (C.A.).

⁴²R.S.O. 1960, c. 234, s. 43.

⁴³R.S.O. 1960, c. 322, s. 33.

⁴⁴*Supra*, note 41 at 508.

context is the Alberta decision of *Gloning v. Miller*.⁴⁵ In 1947 the defendant physician performed a Caesarian section on the plaintiff. The plaintiff recovered and thereafter consulted the defendant from time to time in his capacity as family doctor for her own general medical needs and those of the child. In 1952 she consulted him about a lump in her abdomen, and when the condition did not improve he referred her to a cancer clinic. An X-Ray revealed the presence of forceps. The defendant then operated successfully to remove the foreign object, and the plaintiff regained her health. McLaurin C. J. of the Trial Division of the Supreme Court had no difficulty in finding negligence. He then turned to the question of whether the action was barred by the limitation provision in *The Medical Professions Act*.⁴⁶ He evinced no doubt that if the plaintiff had not availed herself of the services of the defendant as her family doctor and the forceps had been removed by some other physician she would have faced an insuperable barrier to recovery. However, because she had continued to consult with the doctor and permitted him to remove the forceps, the court was able to conclude

The matter complained of was the forceps, and with respect to the presence of the forceps in her abdomen Dr. Miller was continuing to provide professional services when he sent her to the cancer clinic and thereafter undertook to correct the error that he had made.⁴⁷

The implications of this decision are clear. It is not necessary for the patient to prove that the subsequent treatment is a necessary and normal extension of the initial procedure. Thus in this case he did not have to prove ongoing treatment as the aftermath of the Caesarian section, for example regular post-operative examinations. It is enough that the consequences of his negligence in conducting the earlier procedure, be it by leaving a foreign body inside the patient or by damaging an organ, is treated or remedied by him at a later date. The latter treatment may of course be significantly *en retard* of the termination of any normal follow-up to the earlier procedure. In terms of substantive scope it would not be inconsistent with the decision to apply it in the case of negligent diagnosis where the physician subsequently treats the patient for the malady which he had neglected to discover. Furthermore it may be permissible to extend it to a situation where the offending doctor discovers by subsequent diagnosis the fruits of his earlier error and refers the patient to another doctor for remedial treatment. In such a case the treatment does not end until that reference to the other doctor takes place. The word 'services' is clearly broad enough to incorporate medical examination. The circumstance where the extension would not apply is where the services provided by the doctor have no relation to either the initial procedure or the negligence. It is not sufficient that the doctor happens to be treating the patient for another ailment.

The *Gloning* decision clearly goes far in postulating a broad notion of continuing services. Apart from that case, however, there is little in the way of guidance in Canadian jurisprudence. In the Ontario case of *Town v. Archer*⁴⁸ it was established that the term 'services' assumes the continued contact of the

⁴⁵ (1953), 10 W.W.R. 414 (Alta. S.C.T.D.).

⁴⁶ R.S.A. 1942, c. 295, s. 64.

⁴⁷ *Supra*, note 45 at 417.

⁴⁸ (1902) 4 O.L.R. 383 (K.B.).

defendant with the plaintiff, *qua* patient, and not in any other capacity. In that case the plaintiff, feeling that she had been negligently treated by the defendant after falling and injuring her ankle, consulted another physician. Thereafter her only contacts with her former doctor were two visits to his office to register her complaints. The court held that the defendant had not rendered professional services to her within the year prior to launching of the action.

The functional scope of continuing medical services can only be surmised. Following the spirit of the *Gloning* decision it would presumably cover any situation where the doctor is by surgery, therapy, treatment by the prescription of drugs and medications, or examination following up on the procedure in the course of which it is alleged malpractice took place, or responding to the adverse consequences of the alleged negligence.⁴⁹ Whether ongoing consultations between the parties are necessary is a moot point. Would services be considered as continuing where the physician gives the patient an open prescription to be filled by a pharmacist when the supply is exhausted? Given the way in which doctors dispense their services today and the lesser importance which is attached to personal attendance by or on the patient, it would seem perfectly in order to include this type of situation.

While liberal interpretation of continuing services is a boon to some patients, it is of course far from being a complete elixir. In some instances continuing services will not be rendered. Even if medical services related to the negligent procedure which cause injury continue they may well be terminated before the cause of action becomes apparent. Moreover, once the patient changes doctors, the continuing services argument will be of no avail. There are, of course, a variety of reasons why a patient may shift to another doctor. Either the patient or the doctor may change location. The latter may take a specialty or discontinue his practice. The patient may simply decide to seek medical assistance elsewhere. In each of these instances the patient may unwittingly forfeit his ability to sue the author of his misfortune.

The case law shows unequivocally that the effect of the special limitation periods for medical malpractice in belated discovery cases depends entirely on chance. Moreover, the resulting dichotomy in judicial response may produce a situation in which legal and medical propriety are in direct conflict. It is clear that the patient's legal position is only secure if he continues to seek the counsel and advice of the errant doctor. However, medically the continuation of that relationship may be entirely detrimental to the patient. If the physician has erred once he may well err again. Secondly, he is not as likely to be as objective in his evaluation of a developing injury, as an independant third party would be. Indeed, in some cases he may actively try to conceal the fruits of his ineptitude, thus denying the patient the remedial procedures necessary to deal with his health problems. If the patient takes the course which may be medically more beneficial and consults another doctor, he may have thoroughly compromised his legal position.

By any contemporary standards of sound social policy the equivocal situation of the patient in these cases is entirely unsatisfactory and calls out for remedy.

⁴⁹ A suggestion that the prescription of medications or drugs is sufficient is found in *Pierce v. Strathroy Hospital* (1924), 27 O.W.N. 180 (H.C.).

Act IV — A Prescription for Patients

There is an obvious need for legislation to correct the inequities caused by present limitation periods in medical negligence actions. The courts have already indicated that the task is beyond their capacity, given the specificity of the legislative provisions with which they have been dealing.⁵⁰

In a minority of jurisdictions in Canada legislative steps have been taken which improve the patient's position. These legislative changes vary in scope and effectiveness. None of them is entirely satisfactory.

The least effective is the Nova Scotian expedient of incorporating the special limitation periods for doctors, dentists and hospitals in the general Statute of Limitations.⁵¹ It is expressly subject to the infancy exception,⁵² and while the statute is mute on the matter of fraud, it could be argued that the general equitable principle of fraudulent concealment which is recognized by both English and Canadian courts qualifies the whole act.⁵³ Whether it does or not may depend in the final analysis on whether the court feels compelled to rule that the wording in the medical malpractice section, which makes the ubiquitous reference to the termination of services, admits of no qualification in the absence of a specific reference to concealed fraud within the Limitation Act. Apart from this uncertainty in interpretation the Nova Scotian provision has obvious functional short-comings. In the first place it leaves a gross disparity of five years between the time periods applicable to medical malpractice and ordinary negligence. Secondly, it only deals tangentially with the problem of belated discovery.

Two provinces have decided that as a matter of policy there should be a greater degree of contact between the general limitation statute and special limitation provisions including those in medical legislation. In Alberta, where a major revision of limitation legislation was undertaken in 1966,⁵⁴ all special limitation periods for tort actions are now expressly incorporated into the general statute.⁵⁵ While there is still a disparity of one year between medical malpractice and other negligence actions, it is now clear that the statutory exceptions for fraud and disability apply to the malpractice suits.⁵⁶ However, once again the response of the legislature is piecemeal, and continues the disparity in the period of limitation.

Manitoba has stopped short of directly incorporating the special statutory provisions into the general statutes on limitations. However, by altering its

⁵⁰In *Miller v. Ryerson*, *supra*, note 24, Meredith J. at 373 stated expressly that the solution to the plaintiff's hardship lay with the Legislature.

⁵¹R.S.N.S. 1967, c. 168, s. 2.

⁵²R.S.N.S. 1967, c. 168, s. 3.

⁵³See *Bulli Coal Mining Co. v. Osborne*, [1899] A.C. 351 (P.C.); *Oelkers v. Ellis*, [1914] 2 K.B. 39; *Lynn v. Bamber*, [1930] 2 K.B. 72; *Naujokot v. Bratushesky*, [1942] 2 D.L.R. 721 (Sask. C.A.), 2 W.W.R. 97; *Beamer v. A.R.T.S. Ltd.*, [1949] 1 K.B. 550 (C.A.); *Kitchen v. R.A.F. Assoc.*, [1958] 2 All E.R. (C.A.); *Joncas v. Pennock* (1962), 32 D.L.R. (2d) 756 (Alta. C.A.); *Clark v. Woor*, [1965] 2 All E.R. 353.

⁵⁴An Act to Amend the Law respecting Limitation of Actions in Torts, S.A. 1966, c. 49.

⁵⁵See *The Limitation of Actions Act*, R.S.A. 1970, c. 209, s. 55.

⁵⁶*The Limitation of Actions Act*, R.S.A. 1970, c. 209, ss. 57, 59.

Limitation Act in 1966 the legislature set a common period for negligence actions resulting in personal injuries of two years, and specifically brought the shorter periods contained in special statutes such as the Medical Act into line by express amendment.⁵⁷ More significantly the province incorporated into its general statute a series of sections based upon the English Limitation Act of 1963⁵⁸ which attempt to deal in general terms with the problem of belated discovery. According to section 15 of the revised *Limitation Act*

- (1) No enactment limiting the time for beginning actions affords a defence to an action to which this section applies insofar as the action relates to, or is founded on a cause of action in respect of which
 - (a) it is proved to the satisfaction of the court that the material facts relating to that cause of action were, or included, facts of a decisive character which were at all times outside the knowledge, actual or constructive, of the plaintiff until a date which
 - (i) either was after the end of the limitation period fixed in respect of that cause of action, or was not earlier than twelve months before the end of that period, and
 - (ii) in either case, was a date not earlier than twelve months before the date on which the action was begun; and
 - (b) the court has whether before or after the beginning of the action granted leave for the purpose of this section.

The application of the exception is confined to cases of personal injury resulting from negligence, nuisance or breach of duty (whether derived from contract, statute or independently of either).⁵⁹ Material facts are defined as decisive 'if they were facts which a reasonable person, knowing these facts and having obtained appropriate advice with respect to them would have regarded at that time as determining in relation to that cause of action, that . . . an action would have a reasonable prospect of succeeding and of resulting in an award of damages sufficient to justify the bringing of the action.'⁶⁰ The exception covers not only the situation where the plaintiff does not become aware of his injury during the limitation period, but also instances where he knows he has suffered injury but does not know of its nature or extent, or is unable to ascertain its true cause.⁶¹ 'Appropriate advice' is defined as 'the advice of competent persons qualified in their respective spheres, to advise on the professional or technical aspects of that fact or those circumstances, as the case may be.'⁶²

These provisions clearly strike at the heart of the belated discovery problem and could well avail patients in medical malpractice cases.⁶³ However, the Manitoba legislative response is deficient in a number of respects. In the first

⁵⁷*Supra*, note 4.

⁵⁸See The Limitation of Actions Act, R.S.M. 1970, c. L 150, ss. 15-21, following the Limitations Act, 11 & 12 Eliz. 2, c. 47.

⁵⁹The Limitation of Actions Act, R.S.M. 1970, c. L 150, s. 15(2).

⁶⁰The Limitation of Actions Act, R.S.M. 1970, c. L 150, s. 21(6).

⁶¹The Limitation of Actions Act, R.S.M. 1970, c. L 150, s. 21(5).

⁶²The Limitation of Actions Act, R.S.M. 1970, c. L 150, s. 21(9).

⁶³The Legislation in Manitoba suffers from sloppy drafting. There is no explicit reference to the special limitation provisions relating to medical malpractice in Part II which covers belated discovery. However, it is probably safe to assume that the words 'no enactment' contained in s. 15(1) refer to all other limitation provisions wherever located.

place it would have been more logical to have scrapped all special limitation periods, and allowed the general statute to cover all negligence actions.⁶⁴ Secondly, the provisions on belated discovery are unnecessarily complicated. Following closely the format of the English model it takes five rather involved sections to respond to the problem.⁶⁵ In part the length is explained by the need to relate the provisions to other statutes such as the Trustee and Fatal Accidents Acts, in part by lengthy interpretive passages, and in part by a rather elaborate procedure for bringing the issue before the court. The detailed language suggests that the legislature wanted to allow as little free rein to the courts as possible. While accepting that injustices had taken place under the pre-existing legislative scheme, it wanted to make abundantly clear that these provisions constituted a closely confined exception to the norm. In fact the English experience since 1963 shows that this formulation has proven fertile soil for difficult problems of statutory interpretation.⁶⁶ Ironically, it has been those sections dealing with interpretation, which presumably were designed to obviate debate, that have given the most trouble. Thus there has been a spate of litigation dealing with the issue of whether the limitation period runs from the time the material facts which are decisive to the recognition of a cause of action are known to the plaintiff, or from the earliest time he can reasonably establish by seeking legal advice that he has a right to sue.⁶⁷

The only province which has dealt explicitly with the problem of late discovery in medical malpractice cases is New Brunswick. In enacting a new *Medical Professions Act* in 1958,⁶⁸ the Legislature retained the short limitation period of one year, but related the commencement of the limitation period to the day of discovery of the cause of action.⁶⁹ This provision represents a marked improvement over the special statutes elsewhere, in that it recognizes the basic problem and tries to meet it head on. However, even this formulation is open to objection. It is not related to an overall attempt to merge general and special limitation provisions. Consequently there is still a considerable disparity between the limitation periods in malpractice and negligence in general. Moreover its wording may be criticized in that it is too abstract. More particularly the term 'day of discovery' is used without any direction as to whether that means the actual day of discovery, or whether it extends to the day when discovery should reasonably have been made.

Any useful legislative approach to medical malpractice limitation periods has to be viewed from the perspective of broad reform of limitation statutes and their application to tort actions, particularly those covering personal injury.

⁶⁴It is odd that this was not done, because most of the limitation periods for personal injury were changed to two years by the amending legislation.

⁶⁵This provides an interesting contrast with the provision on concealed fraud which takes up three lines, *supra*, note 58, s. 7.

⁶⁶In *Pickles v. National Coal Board*, [1968] 2 All E.R. 598 (C.A.) Lord Denning M.R. referred to the 1963 Limitation Act as 'this very complicated and obscure Act'.

⁶⁷See *Pickles v. N.C.B.*, *supra*, note 66; *Skingsley v. Cape Asbestos Co.*, [1968] 2 Lloyd's Rep. 201 (C.A.); *Newton v. Cammel Laird, Co.*, [1969] 1 W.L.R. 415 (C.A.); *Drinkwater v. Joseph Lucas Ltd.*, [1970] 3 All E.R. 769 (C.A.); *Smith v. Central Asbestos Co.*, [1972] 3 W.L.R. 333 (H.L.).

⁶⁸Medical Act S.N.B. 1958, c. 74.

⁶⁹Medical Act S.N.B. 1958, c. 74, s. 30.

The recent attempts at rationalization in Alberta and Manitoba,⁷⁰ have contributed to this reform, but fall short of remedying a number of deficiencies perceived in this article. What is required is the sweeping reformatory approach contained in the 1969 Report of the Ontario Law Reform Commission on Limitation of Actions.⁷¹

The first principle which must be accepted is that there should be no disparity between the limitation periods for different torts or different species of the same tort which result in personal injury. There has never been, nor is there now any functional reason why the length of limitation periods in negligence, malpractice and trespass to the person should be different. The reason for the differences is simply due to the anachronistic form and length of the period set out in the Statute of Limitations of 1623.⁷² This concern has manifest itself in some jurisdictions in mere *ad hoc* amendment to the general statute decreasing the limitation period for trespass to the person.⁷³ Other jurisdictions have gone further and scrapped the six year formula and its quaint wording, opting instead for a two year period.⁷⁴ Since all jurisdictions adopted and retained the six year limitation period until the early nineteen thirties, most of them were subject to pressure for a reduction in the period from special interests such as the medical profession and hospitals, and responded with special and distinct legislative provisions.⁷⁵ The confused consequences of this piecemeal amending practice could be eliminated if a new uniform period of limitations, more in tune with the realities of modern life, were adopted. Limitation enactments have been characterized as 'acts of peace', designed to preserve defendants from the pursuit of stale claims, to induce plaintiffs not to sleep on their rights and to guarantee to the defendant that after a certain period the incident is closed as a matter of law.⁷⁶ Whatever the factors militating in favour of a leisurely approach to the commencement of actions in the days of the first Stuart, the faster pace of modern life, the greater speed and efficiency of communications and the greater availability of expert evidence suggest that a substantially shorter period would be satisfactory. The Ontario Law Reform Commission has suggested a period of two years.⁷⁷ The shorter period has, of course, already been accepted by those jurisdictions which have adopted the Uniform Act of 1931.⁷⁸ The Commission was obviously influenced in its suggestion by the

⁷⁰ See text *supra* at pp. 94, 95.

⁷¹ Ontario Law Reform Commission, *Report on Limitation of Actions* (1969).

⁷² 21 Jac. 1, c. 16, s. 3.

⁷³ See British Columbia, R.S.B.C. 1960, c. 370, s. 3; Newfoundland, R.S. Nfld. 1952, c. 146, s. 2; Ontario R.S.O. 1970, c. 246, s. 45 (1)(j). In each of these jurisdictions the period for assault, battery, wounding and imprisonment is four years. See also New Brunswick R.S. N.B. 1952, c. 133, s. 4 (2 years) and Nova Scotia R.S.N.S. 1967, c. 168, s. 2 (1) (a) (1 year).

⁷⁴ Alberta, R.S.A. 1970, c. 209, s. 51; Manitoba, R.S.M. 1970, c. L 150, s. 3(1) (d), Prince Edward Island, R.S.P.E.I. 1951, c. 87, s. 2; Saskatchewan, R.S.S. 1965, c. 84, s. 3; North West Territories, R.O.N.W.T. 1956, c. 59, s. 3; Yukon, R.O.Y.T. 1958, c. 66, s. 45.

⁷⁵ See *supra*, notes 1, 3-12.

⁷⁶ See *Report of the Committee on Limitation of Actions in Personal Injury*, (1962; Cmnd. 1829) at 9.

⁷⁷ *Supra*, note 71 at 42.

⁷⁸ *Supra*, note 74.

fact that all the special limitation periods in Ontario prescribe a year or less.⁷⁹ Two years, in their opinion is a period which would give adequate time to plaintiffs to pursue their claims, and yet protect defendants from the kinds of vexatious and annoying claims that justified special periods of limitation initially. Given the successful experience with the two year period in six Canadian jurisdictions it is hard to find fault with the contention that it is fair to plaintiffs.⁸⁰ As far as defendants who have hitherto enjoyed a shorter limitation period are concerned, the modest increase seems a minimal sacrifice in view of the consistency and, thus, simplicity which will be achieved by its adoption.

The second desirable change is the articulation of a common starting point for the commencement of the limitation period in all factual situations covered by the same tort. In all negligence actions the point of time selected should be the occurrence of damage. It is accepted that medical malpractice falls under the general rubric of negligence.⁸¹ Whatever doubts there may have been about the proper time for commencement of limitation periods in negligence cases when the special legislative provisions governing medical situations were devised, it is now settled that it is the damage or injury which completes the cause of action.⁸² Accordingly there is now no reason why a different rule should apply in medical negligence cases. If this step is taken it will mean that the phrase 'the termination of services in the matter complained of' will disappear from the statute book.

With the establishment of a common time period and the abandonment of a special starting point for limitation periods in medical malpractice cases, the rationale for separate legislative provisions disappears. Consequently, malpractice cases can be subsumed under the provision dealing with torts causing personal injury in the general limitation statute.

The coalescence of various forms of negligence in one limitation statute opens the way for the introduction of a fourth expedient, a provision dealing with the belated discovery. The Manitoba legislation and its English forbear are unnecessarily complex, and, as already stated, the English formula has been productive of a good deal of interpretative wrangling.⁸³ This experience in England suggests that there may be some virtue in simplicity of formulation. No attempt will be made here to articulate in detail draft provisions covering belated discovery. Clearly the form and scope of these will depend in the final analysis upon how broadly the problem is viewed by the legislature, and how far the legislature feels it can go in departing from the existing law. The point of the comments in this article is to highlight some of the problems which are particularly relevant to belated discovery in medical malpractice cases, and the

⁷⁹ *Supra*, note 71 at 39.

⁸⁰ While it is difficult to find evidence to support this contention, it is perhaps significant that a recent report of the Commission on Uniformity of Legislation in Canada on Limitations of Actions, written by the Alberta Commissioners, has enthusiastically espoused the two year period. Alberta, of course, has had such a limitation period for negligence causing personal injury since the early nineteen thirties. See Proceedings of the 50th Meeting of the Conference of Uniformity of Legislation in Canada (1968) 69.

⁸¹ See Nathan, *Medical Negligence* (London: Butterworths, 1957) at 6-19.

⁸² See *Long v. Western Propeller Co.* (1968), 67 D.L.R. (2d) 345 (Man. C.A.).

⁸³ See text *supra*, at p. 95 and accompanying footnotes.

factors which should be considered in seeking to respond effectively to those problems in the revamping of limitation legislation.

A primary consideration is the extent to which the plaintiff should be protected in belated discovery cases. From what has been said earlier in this article it is clear that there are two major problems which confront the plaintiff. The first is that he may have no idea that he has suffered any harm. The second is that, even though he may be aware of an ailment he may be unable to associate it with any conduct on the part of the defendant. Moreover, there is nothing inherent in medical procedures which would alert the plaintiff to the possibility that in subjecting himself to them he is going to suffer further harm through carelessness on the part of the doctor. His situation is not akin to that of the individual who has been involved in a traumatic incident, such as a road accident, which portends injury even though the injury is not readily apparent. In most instances after undergoing surgery or treatment, a plaintiff will reasonably assume that the medical techniques employed have been faultless, and that there have been no complications in the absence of any information to that effect from the doctor. Given this clear disadvantage of the plaintiff in the medical malpractice suit in eliciting the facts which would support a cause of action⁸⁴ the scope of the remedial legislation is clear. The belated discovery exception must extend to the plaintiff's justifiable ignorance of both the fact of injury and of the fact of a causal relationship between illness or injury and the conduct of the doctor.

Arguably the exception should be drafted to include not only situations where the plaintiff is oblivious of an injury or its cause, but also those where both factors are appreciated, but the degree of injury appears trivial or its nature obscure. Both the English and Manitoban legislation provide for these contingencies.⁸⁵ There is a major objection to this extension of the belated discovery notion, which is that it institutes a major policy orientation in the method of claiming damages by the backdoor. If considerable leeway is to be allowed to plaintiffs as to when they launch claims for damages, then surely that warrants the development of distinct legislation. It should not be handled by mere incorporation into an existing legislative scheme, the purpose of which has always been to expedite the launching of claims in the interest of defendants. Legislation designed to tackle the broader problem presented by a plaintiff's insufficient knowledge of both facts and law when faced with a decision of whether to sue or not, obviously requires a great deal of study and debate. Moreover, it may require responses which go far beyond the ambit of the English and Manitoban provisions. For example, if a belated suit is allowed where trivial damage ultimately manifests itself in more serious injury, it can be argued that provision should be made for the situation where damages are awarded, but subsequent deterioration in the plaintiff's health renders the award grossly

⁸⁴It is interesting to note that the English Limitation Act 1963 took as its cue the need to protect workers who have contracted insidious diseases which take time to manifest symptoms. In the scale of relative disadvantage plaintiffs in industrial disease cases would seem to be better placed than their counterparts in medical malpractice cases, because it may be argued that the working environment of the former will give them some hint of future health problems.

⁸⁵Limitations Act 1963, 11 & 12 Eliz. 2, c. 47, s. 7(3); The Limitations of Actions Act R.S.M. 1970, c. L 150, s. 25(1).

inadequate. However, whatever the merits or demerits of a more revolutionary approach to the problems of inadequate knowledge on the part of plaintiffs generally, belated discovery situations in malpractice suits would be quite adequately covered by a provision which was confined to problems presented by latent injury and unexplained cause.

A second issue which relates to the problem of the breadth of protection afforded by the legislation, is how to determine the time of discovery. A simple formula would be one which made the date of actual discovery, by the plaintiff, of the fact of injury or cause, the starting point for the commencement of the limitation period. The difficulty with this approach, however, is that it ignores the fact that in some situations a diligent plaintiff in a medical negligence case might have learned of his situation earlier. The plaintiff in question may have suffered from an ailment, or at least noticed its symptoms over a long period of time without making any attempt to seek medical advice. The legislator should not reward irresponsibility on the part of the plaintiff, and therefore the legislation should be framed so that time may run from the date when the fact of injury or its cause could reasonably have been discovered.

What factors are significant in determining whether the plaintiff should have realized that he had the basis for an action? Heretofore the emphasis has been placed upon the facts of injury and causation which underlie a cause of action. This has been done advisedly because traditionally limitation periods have commenced to run when those facts are in existence. The running of time is not postponed merely because the plaintiff neither appreciates nor seeks advice on his legal rights. The reason is that a procrastinating complainant could effectively subvert the policy of limitation periods by refusing or failing to seek the services of a lawyer. The assumption is made that the plaintiff is aware of the facts and knows his legal rights. Consequently, he only has himself to blame if he fails to sue within the prescribed limitation period. There is no reason why the plaintiff in the belated discovery case who ultimately gains access to facts should be treated differently from the plaintiff who had immediate access to them. Accordingly, it is inequitable to use as a criterion of constructive knowledge the availability of sound legal advice. Interestingly enough, the English courts, culminating in the recent decision of the House of Lords in *Smith v. Central Asbestos Co. Ltd.*,⁸⁶ have concluded that the operation of the belated discovery rules in the 1963 Limitation Act does depend upon the plaintiff receiving or having access to legal advice. This result stems from interpretation of the distinctive terms of that Act, and consequently has no validity in Canada, except

⁸⁶[1972] 3 W.L.R. 333 (H.L.). The court by a 3 to 2 majority decided that the plaintiff who was suffering from asbestosis was ignorant of a 'material fact' under the Legislation, where he had been told in good faith by the works manager of the defendant plant, that he could not launch a negligence action while receiving disability pension, and therefore failed to launch his action when he first knew that he had contracted the disease. Interestingly enough three judges, two in the minority Lords Simon and Salmon, and one of the majority Lord Pearson, decided that a person's lack of knowledge that he has a worthwhile cause of action is not a 'material fact' which prevents time running. Lord Pearson, however, concluded that a plaintiff did not know all of the 'material facts' unless he knew as a fact that the defendant was at fault and that his injuries were attributable to that fault!

The division of opinion in this case should provide an object lesson to any draftsman wishing to follow faithfully the English pattern.

perhaps in Manitoba. Given the basic disparity between the treatment accorded to the 'belated' as distinguished from the 'ordinary' plaintiff produced by this interpretation, the Canadian draftsman should be careful not to emulate the English provision.

Surprisingly, the belated discovery provisions of the Ontario Law Reform Commission are equivocal in this respect. The Report suggests that the English statute is too complicated to serve as a satisfactory model.⁸⁷ The Commission, accordingly, developed a less complex series of provisions. However, these include one section which is borrowed directly from the English statute, and which may give rise to the interpretative problems which the Commission presumably desired to avoid.

The draft provision reads:

The extension should be granted where a potential plaintiff was unaware of material facts which if he were a reasonable person knowing those facts and having obtained appropriate advice with respect to them would have been of a decisive character in determining that he had an action

- (a) which would have a reasonable prospect of succeeding and
- (b) result in the award of damages sufficient to justify bringing it.⁸⁸

The term 'appropriate advice' is tailor-made for controversy. Does it refer to expert advice which would apprise the plaintiff of the fact of injury, or which would isolate the instrumentality or activity causing the harm, or does it extend to advice that would notify the plaintiff of his legal rights? In answering this difficult question a court might well find solace in English authority and include legal advice, thus producing the inequity described above.

If it is accepted that no special treatment should be accorded the 'belated' plaintiff in seeking legal advice before the commencement of the limitation period, it is legitimate to make allowance for access to medical advice. In the medical malpractice suit, for example where the surgeon leaves a foreign object in the patient's body, the latter generally will not be in a position to appreciate the significance of the injury nor to elicit its cause by exercising his own judgement. His only source of enlightenment is likely to be a medical practitioner. Accordingly the determination of the date of constructive discovery should be related to the patient's access to sound medical advice, and whether he reasonably availed himself of it when symptoms of his malaise developed. The words 'medical advice' are qualified by the adjective 'sound' advisedly because there may be situations where medical advice is sought but proves inadequate and fails to reveal the source of the problem. In such cases it would be unfair to the plaintiff to use the oversight of the second doctor as an excuse for denying his suit against the first.

Having established the juncture at which the limitation period commences to run, the final step is to determine the duration of the extension period. The English and Manitoban Acts, as well as the Ontario Report stipulate a period of one year.⁸⁹ As discovery of the facts underlying a cause of action may take place many years after the negligent act, a one year period seems to provide a reasonable time for the plaintiff to act, without extending unduly the period during which the defendant is open to suit. In two American jurisdictions in

⁸⁷ *Supra*, note 71 at 107.

⁸⁸ *Id.* at 108.

⁸⁹ *Supra*, note 85, s. 7; 15 (1).

which specific legislative reference is made to discovery in medical negligence cases a maximum number of years is prescribed during which the plaintiff can plead belated discovery.⁹⁰ This is clearly designed to obviate the bringing of claims years after the negligent act, when documentary evidence may have disappeared, witnesses may be dead or dispersed and memories confused. It may be questioned whether this is a desirable qualification. It has been shown in a number of American cases that injuries caused by foreign objects left in a patient's body, for example, may not manifest themselves for an extended period of time.⁹¹ Moreover, the very nature of the risk which the defendant doctor creates is that the injury which he has done will not be disclosed for some time.⁹² Indeed, it may be argued that the doctor has committed the double wrong of treating the patient negligently, and of preventing the plaintiff from taking timely action by doing it in such a way that the consequences are concealed.⁹³ Whatever theory one uses to characterize the doctor's conduct any maximum limitation can only serve unjustly to relieve a negligent defendant at the expense of a deserving plaintiff. It may be more difficult for the doctor to respond with a plausible explanation of what happened where many years have passed, but on balance that is less troubling than the fact that injured patients will be denied justice.

If the suggestions contained in this article pertaining to the reform of limitation legislation were implemented there is little doubt that the palpable injustice which is done to plaintiffs in medical malpractice cases would be effectively removed. There are no cogent arguments which can be raised against the reforms advocated and they are certainly not revolutionary. Already Manitoba has shown the lead in bringing the time periods in all personal injury cases into line with each other.⁹³ The Legislature in Alberta has seen the virtue of bringing all limitation periods together in one statute.⁹⁴ New Brunswick in its Medical Act has indicated that there is no magic in selecting the termination of services as the point in time at which the limitation period commences to run.⁹⁵ Legislative reforms allowing a belated discovery exception have been undertaken in common law jurisdictions both within and without Canada, based on the premise that the traditional limitation provisions have caused injustice in such cases.⁹⁶ Furthermore, the Ontario Law Reform Commission has produced a comprehensive and well-reasoned blueprint for reform.⁹⁷ The challenge posed to the Canadian legislators is clear.

⁹⁰Connecticut G.S.A. 1958 § 52-584; Illinois Rev. Stat. 1965, c. 83, § 22.1.

⁹¹See e.g. *Weinstein v. Blanchard* (1932), 109 N.J.L. 332, 162 A. 601 (drainage tube left in chest area, found 19 years later); *Billings v. Sister of Mercy of Idaho* (1964), 86 Id. 485, 389 P. 2d. 224 (gauze sponge left in body exposed 23 years later); *Hawks v. De Hart* (1966), 206 Va. 810, 146 S.E. 2d. 187 (surgical needle left in neck discovered 17 years later).

⁹²I am grateful to my colleague Professor Ray Brown for this observation.

⁹³This alternative theory comes close to rationale of Rand J. in *Cook v. Lewis*, [1951] S.C.R. 830 for shifting the burden of proof on the causal issue to the defendant hunters. In his Lordship's mind the defendants committed the dual error of shooting, carelessly, knowing that there was another party in the vicinity, and of doing it in such a way as to confuse the issue of who actually hit him.

⁹⁴See *supra* text, at p. 94.

⁹⁵See *supra* text, at p. 96.

⁹⁶See *supra* text, at p. 99.

⁹⁷See *supra*, note 71.